No. 11376

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as BARNES-WOODIN FUR DEPARTMENT,

Appellee.

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, Jr.
Attorneys for Appellant

426 Miller Building
Yakima, Washington

SUBJECT INDEX

TABLE OF CASES

OTHER CITATIONS

For the most part appellee's contentions have been already fully answered in our opening brief. Appellee's brief contains numerous errors, inaccuracies, and misstatements of fact and law, so that within reasonable reply brief space limitations it will be impossible to discuss all of them. We shall, however, reply briefly to the more important errors therein.

With only rare exceptions, no record citations are given by appellee as required by the rules of this court. These are evidently omitted for the reason that the record does not substantiate such statements.

Appellee has not even attempted to distinguish any of the numerous authorities cited by us in our opening brief.

Moreover, with one or two minor exceptions, appellee has not cited any authority whatever in support of any of his contentions herein. This is readily understandable, however. in view of the unsound nature of those contentions .

For the sake of convenience we shall reply to appellee's principal contentions in the same order and under the same headings as they appear in appellee's brief.

A. WAS NOT A ROOM

As shown on the diagram, exhibit 5, the general shape of this space in question may be described as somewhat similar to a straight-back chair consisting of the back, seat,

and front legs, with the rear legs omitted. However, of course it was not that narrow. The same extended for the most part in an easterly and western direction with what might be called a jog in the middle in a northerly and southerly direction.

However, appellee's reference to this as a "narrow passageway" (p. 12) is clearly not correct. No witness testified that this was a narrow passageway. All of the evidence, including the diagram, exhibit 5, clearly shows that this was not a narrow passageway, but was the wide middle portion of the space or alleged room in question.

Appellee is also clearly in error in stating (p. 2) that there were walls between this space or alleged room and the sales room. It is undisputed that the only dividing line was not a wall, but was a high row of show cases in which fur coats for sale were hanging in the sales room. (162, 269-70, 276-7). This space was not a room, because it was not enclosed on all sides by either walls or partitions.

Again on page 12 appellee erroneously refers to "the work room to the east of the salesroom." It is undisputed that there was a work room to the north and west of the sales room, but not to the east thereof. Appellee's adroit suggestion (p. 12-13) that there was a work room to the east of the sales room and a separate storage room to the west of the sales room, is purely a figment of the imagination and contrary to all of the evidence.

While it is true that the show cases between the sales room and the work room extended to the ceiling, there was no evidence that the same were of a permanent built-in nature as erroneously stated by appellee. (p. 13), nor that the same constituted a permanent wall.

Appellee suggests (p. 13) that this was merely a question of fact and that the trial court's ruling should not be disturbed unless the evidence preponderates against the same. There are at least two conclusive answers. (1) The evidence clearly does preponderate against the decision of the trial court. (2) This was *not* a disputed question of *fact* at all, but simply a case where the trial court and appellee have drawn incorrect inferences and conclusions from the basic facts which stand undisputed. For these reasons the judgment should clearly be reversed.

B. WAS NOT A STORAGE ROOM

This is admittedly the principal question in the case, as if our contention is correct, most of the other questions become immaterial.

Contrary to appellee's vague suggestion (p. 13), it is undisputed that there was never any wall or partition of any nature between the north and east ends of this alleged room—which appellee concedes was the work room —and the west end thereof, which appellee calls "the store room"—whatever that may mean. (160, 219-20, 272-3).

This term is repeatedly used by appellee apparently on the theory that any room in a store may be classified as a store room. The court, however, will bear in mind that the insurance policy contract does not anywhere use the term "store room," but on the contrary uses the term *"storage room."*

What appellee means by the term "two separate units" (p. 14) we are at a loss to understand. Nowhere is such a term used in the policy contract nor in the evidence. Appellee offers no valid reason why we should so classify what is actually a single room—if it be a room at all, which we deny—and which was used for a single purpose, namely, as the work room for repairing, fitting, and altering fur coats, and as incidental thereto, temporarily hanging up the same until they could be reached to be worked upon.

On the very first page of his brief appellee concedes that when he moved into the Barnes-Woodin store and when this policy was issued, his facilities "consisted of *a storage room on the second floor of the building,* a sales room, on the mezzanine, and, in connection with said sales room, a *work room.*" (All italics are ours). The same arrangement of space and rooms continued thereafter up to the time of the fire.

Even if this space was a room, in view of the undisputed facts that there was *no wall or partition of any nature dividing the same into two rooms*—how in the name

of common sense can it be said that this room consisted of two rooms, namely, a work room and a storage room?

Councel misconceive entirely our contention when (p. 18) they resent inference of perjury. We have never accused anyone of perjury in testimony as to the lay-out and arrangement of the space in this store. No one testified that there was a wall or partition across the middle of this room or space, nor that the same consisted of two separate rooms. Consequently how could we accuse anyone of perjury in so testifying when no one has so testified? What we did say, and what we now repeat, is that *this contention that two rooms grew where only one grew before, was and is the unsupported fruit of the over-productive imagination of counsel.*

We agree with appellee's admission (p. 18) that *"there was no question as to how this room was constructed or where these partitions were." That is precisely the principal ground of our appeal.* Since there was *no partition* and *only one room,* if any, how could anyone rightfully contend that the same consisted of two separate rooms?

Appellee concedes (p. 3) that "there was no door or other wall separating the mezzanine store room and the work room." He contends however that there was a jog in the wall of this room. Appellee cites no evidence or authority whatever that a mere jog in the walls or an irregular shape of a room has the legal effect of dividing

the same into two separate rooms. His position is manifestly absurd.

Appellee repeatedly erroneously states (p. 4, 12) that the coats remained hanging in the work room from one to three months. Appellee cites no evidence to that effect, and there is none. Testimony was undisputed that the coats remained hanging in the work room for only approximately one month until they were reached for repair work, and then they were placed in storage on the second floor. (201, 224).

Appellee concedes (p. 12) "though we might eat our meals within the four walls of a kitchen of a house, this does not change the fact that the room is a kitchen." Just so. So here the mere fact that incidentally coats were temporarily hung in the west end of the work room until they could be reached to be worked upon, does not change the fact that the room was, primarily at least, a work room and not a storage room.

Manifestly the west end of the work room did *not* constitute a *storage room* when it admittedly was not even walled or partitioned off from the remainder of the work room.

In a futile attempt to avoid the effect of appellee's signed application for this policy (ex. A; 169-172) he contends that a subsequent change occurred in the store ar-

rangement. It is undisputed, however, that although there was some remodelling of the mezzanine in 1943, the method of conducting the business remained the same. At the time of application for issuance of this policy and continuously thereafter up to the time of the fire, it was the uniform practice to hang customers' coats temporarily in the work room until the same could be reached to be worked upon and then they were placed in the storage room on the second floor. (213, 215, 219-20, 228-31, 234-6). The mere fact that the business grew and additional movable racks were placed in the west end of the work room and a plyboard partition placed along the *south side* of the work room manifestly did not transform the same into a storage room.

Whether or not Mr. Orkney saw this incidental remodelling is wholly immaterial. If, as stated in appellee's application, the only storage room for customers' fur coats in this store in 1942 was on the second floor and there was none on the mezzanine, that likewise remained true at the time of the fire in 1944.

Appellee's own evidence shows that up to the time of the fire the west end of this work room contained "fur pieces that we use for repairs." (173, 223). In other words, this was all incidental to the primary purpose and function of this space or room, namely, a work room.

Appellee himself testified:

"Q. Now as I understand, right from March, 1942 when you first went in there, you always had the problem of what to do with the fur coats that were waiting to be repaired and worked on, didn't you? You had to keep them somewhere, didn't you?

"A. *We always had to hang them someplace.* . . .

"Q. And *at that time you used the same method,* didn't you, *of hanging it out in this room here on the mezzanine floor until you got around to working on that coat in its regular order, that is right,* isn't it?

"A. *Yes.*" (205-6).

The only changes made in the remodelling in 1943 were to add additional movable racks and place a partition on the *south* side. (179, 181-2, 193, 210-1).

"Q. Isn't it a fact that you used the same method in 1942 and 1943 as you did in 1944, namely that fur coats of customers that were waiting to be repaired or worked on, you kept them there in the mezzanine floor, rather than in the storage room on the second floor?

"A. Oh, *we always had coats hanging all over down there.*

"Q. You always did, and that was true in '42, also?

"A. *Yes.*

"Q. And *the coats that were hanging there in 1942 and '43, were coats that were waiting to be worked on the same as in '44.* That is right, isn't it? . . .

"A. *Yes.*" (181-2).

In answer to this direct question by the court, appellee testified:

"The Court: Before you built this place, where were those coats?

"A. Well, we didn't have the number and *they were hanging on little racks out here in this work room, right in the work room.*" (201).

Appellee's witness, Bernice Stevens, employed by him continuously since April, 1943, testified:

"Q. What duties did you have relative to coats that came in for repair or for storage?

"A. I received the coats and gave them their necessary receipts.

"Q. And then what did you do with the coat?

"A. *I hung it on the work rack, just through the curtains.*" (232).

"Q. Are you familiar with the processing of them before they are put into storage?

"A. Yes.

"Q. *Are coats put directly into storage?*

"A. *No.*" (234).

It is undisputed that appellee never even contended to the insurance adjusters that any changes had been made after issuance of the policy. (291).

Admittedly coats brought in for repairs, as distinguished from storage, at all times remained on the mezzanine floor, and were never placed in the storage room on the second floor. (325).

At page 16 appellee concedes:

> "Counsel has made much of appellee's signing defendant's "Exhibit A", which was the application for the insurance policy and which only listed the space used for storage of customers' property upon the second floor of the Barnes-Woodin Company. *This application was true* at the time it was entered into, for that was in August, 1942, at which time *that was the only space that was used for storage in that location.*"

Appellee's statements (p. 10, 16) that Mr. Orkney saw any such changes is not correct. Appellee's own evidence, however, clearly establishes that no substantial change in this respect occurred prior to the fire. Mr. Orkney testified that the only change he ever noticed there was the removal of a desk. (301). Appellant was never notified that any changes occurred. (309).

At page 18 appellee concedes that "storage connotes a *permanent* keeping or holding of goods to await some future contingency." This concession should eliminate any further controversy, as it is undisputed that the only room for permanent summer storage was on the second floor.

Tollifson vs. People, 49 Colo. 219, 112 Pac. 794, cited briefly by appellee (p. 14), merely declined to reverse a

verdict of a jury that *a room used exclusively for storage* of mining machinery, equipment, and ore was a storage room. In other words, the situation there was precisely the same as appellee's room on the second floor, but not as to the mezzanine.

C. FINDING AS TO PERCENTAGES OF LOCATION OF DESTROYED COATS IS PURELY SPECULATIVE

Contrary to appellee's suggestion (p. 19) we have never admitted that we were liable for the value of the coats destroyed. This storage room issue was specifically listed in the pre-trial order and has been at all times definitely urged.

As pointed out in our opening brief, it is undisputed that this work room space, if a room at all, consisted of one single work room and not two separate rooms. The attempt to segregate the coats as 75% in one room and 25% in the other is competely contrary to the evidence and based upon wholly unwarranted speculation and conjecture. Appellee admittedly was not even there on the day of the fire or for a considerable time prior thereto. All of the witnesses agreed that after the fire the premises were in such a "mess" that it was impossible for anyone to make a reasonable estimate thereof. (125-6, 175-6, 186, 197, 251, 261, 269, 320).

Under these admitted circumstances appellee is not

aided by his quotation from 45 C. J. S. 1010, sec. 915. This does not justify mere speculation, guesswork, and conjecture. The remainder of this section reads as follows:

> "*The insurer's obligation or liability under a policy of fire insurance is measured and defined by the terms of the policy;* the insured is entitled to recover to the extent of his loss occasioned by the fire, *not exceeding the maximum amount stated in the policy.*
>
> "The obligation or liability of an insurer under a policy of insurance *is measured and defined by the terms of the policy, and cannot be enlarged or varied by judicial construction.*
>
> "Since a contract for insurance against fire ordinarily *is a contract of indemnity,* as discussed supra § 14, insured is entitled to receive the sum necessary to indemnify him, or to be put, as far as practicable, in the same condition pecuniarily in which he would have been had there been no fire; that is, he may recover to the extent of his loss occasioned by the fire, but no more, and he cannot recover if he has sustained no loss. Also insurer's *liability cannot exceed the maximum amount named in the policy. Speculative collateral questions should not be allowed to enter into the ascertainment of actual value.*"

Recovery based on pure speculation is not permissible. *Foss vs. Pacific Tel. & Tel. Co.,* 126 Wash. Dec. 87, 94, ——— P. (2d) ———, decided October 1, 1946.

D. $10,000.00 LIMITATION ALSO APPLIES TO CERTIFICATES

Appellee complains (p. 10, 20) that he paid double insurance upon these certificates. It is undisputed, how-

ever, that appellee paid nothing for these certificates, but merely collected premiums thereon from customers desiring the same, and remitted the same to appellant. Naturally an additional premium charge was made to such customers, as they received additional insurance protection of the coat *at any location,* whether in or out of this store.

Appellee erroneously states (p. 11, 29) that the pleadings admitted that all of the certificate holders filed due proof of loss upon the full amount of their certificates. Not so at all. The answer merely admits that they filed *timely* proof of loss. (25). This admission has no material bearing whatever on any issue on this appeal. These obviously were not separate policies, but expressly incorporated the terms and conditions of the master policy, including the total maximum $10,000.00 limitation. The mere timely filing of proof of loss creates no liability under the contract where none existed in excess of $10,000.00.

A reading of the complaint shows that this is *not* an action to recover upon assigned claims.

F. AMBIGUITY RULE IS NOT APPLICABLE

Appellee speciously contends (p. 21) that there must be "some ambiguity or disagreement," or there would be no litigation. The obvious answer is that there *is disagreement* but there is *no ambiguity* in the language of

the contract. As pointed out at page 62 of our opening brief, the rule contended for by appellee applies only where the contract is ambiguous, and hence has no application here. This is particularly pointed out in the Washington cases cited in appedix G therein, page XXXV.

G. APPELLEE IS BOUND WHETHER OR NOT HE READ THE POLICY CONTRACT

Appellee's contention (p. 24-25) that by some legerdemain the effect of the limitation clauses of the contract was changed by the gradual growth of appellee's volume of business is we submit utterly absurd. As above pointed out, the method of carrying on the business remained the same, and the effect of the contract likewise remained the same.

J. LIABILITY AS TO EACH COAT CANNOT EXCEED VALUATION, IF ANY, STATED ON THE RECEIPT THEREFOR

Any high school boy knows that where appellee recovered several hundred dollars for destruction of a coat as to which no valuation was listed on the receipt, appellant is being held liable for more than the valuation stated on the receipt. The judgment herein was therefor for this reason also clearly erroneous. Under the contract where no valuation was stated, no recovery can be had. Naturally appellee is bound by the negligence and mistakes of him-

self and his own employees. Appellant cannot be bound thereby contrary to the contract.

Ohio Cas. Ins. Co. vs. Miller, 29 Fed. Supp. 993, cited by appellee (p. 29) held that the insurance company was *not* liable because of failure to give timely notice of the accident as required by the policy. Moreover here we are not asking for a forfeiture, but merely for maximum limitation of the amount of our liability as provided in the contract.

Manifestly the fact that each month appellee advised us of a total figure of customers' coats on hand and paid the premium thereon does not in any way abrogate or modify the contract provisions as to appellant's maximum liability in the event of fire. It is true that we are subject to the liabilities assumed by us in our contract, but that liability should not be extended either by appellee's wishful thinking nor by this court imposing upon the parties a new contract to which they never agreed.

It is undisputed that neither appellant nor its agent, Mr. Orkney, at any time inspected appellee's records or had any knowledge as to the contents thereof.

Nowhere in appellee's brief does he even attempt to explain or justify definitely and specifically how he arrived at the amount of the judgment herein. Nor is the same shown by the findings. The amount of the judgment

is grossly excessive and must be reversed.

Appellee manifestly has no better right to recover a greater amount on any particular coat than was claimed therefor in the proof of loss than he would have to recover a larger total amount than that claimed in the proof of loss. He is bound by his sworn proof of loss, not only as to the total, but as to the amount claimed for each particular coat.

L. LIABILITY ON REPLACED COATS CANNOT EXCEED APPELLEE'S WHOLESALE COST

Appellee says that one of the items in the pre-trial order was "loss dependent upon value of coats destroyed." *But nothing was said in the pre-trial order as to whether this was wholesale value or retail value.* Obviously we are not precluded thereby from contending that under the contract appellee cannot recover more than the wholesale value or cost to him of replacing the articles.

Appellee says (p. 32) that the liability is not limited to the cost of purchasing but to the cost of replacing. However obviously for a retail dealer such as appellee the cost of replacing means the cost of purchasing at wholesale.

Contrary to appellee's erroneous statement (p. 33), 45 C. J. S. 1010, sec. 915, does not authorize recovery based on speculation.

Appellant quotes 45 C. J. S. 1013, sec. 915, that cost of replacing is not the measure of liability *in the absence* of a provision therefor in the policy. Here, however, there was such a provision. Moreover the black letter statement therein immediately preceding the portion quoted by appellee is as follows:

> "*Provisions in a policy of fire insurance limiting liability to the cost of replacing, restoring, or repairing the property will be enforced;* in the absence of such provision, the authorities are not uniform as to whether such cost is the measure of liability."

The only case cited in 45 C. J. S. 1014, note 84, quoted in italics by appellee on page 35, commencing "*it has been held* that, where insurer *refuses* to replace . . ." is *Gulf Compress Co. vs. Pennsylvania Ins. Co.,* 129 Tenn. 586, 167 S. W. 859; but it did not relate to wholesale costs at all, but only to a *single* opportunity to purchase certain similar machinery from another certain individual *four months* after the fire. Clearly that has no applicability here.

Prior to the commencement of this suit appellant paid appellee the sum of $8200.00, being nearly all of the admitted liability. If appellee had made settlement with all of the coat owners, the full $10,000.00 would have been paid. Obviously appellant had the right to litigate these questions, and especially to contend that its liability did not exceed $10,000.00. By so doing it still had the right to contend that in any event it is not liable to appellee for

more than his wholesale cost of replacing the coats, under the policy language quoted in our answer. (27).

Appellee testified to his wholesale cost of replacing these coats, which of course includes the cost of manufacture. Nothing should be added thereto for fitting, as he did not so testify.

O. REPLACEMENTS ARE NOT TAXABLE AS SALES

Appelle offers no reason (p. 37) why the trial court increased the amount of our liability in the sum of $3561.46, representing 20% federal luxury sales tax on the full retail value of all replacements, as pointed out at page 76 of our opening brief—especially in view of the fact that appellee admittedly has never paid such a tax and clearly is not legally liable therefor, as held by the U. S. Supreme Court. *Helvering vs. Flaccus,* 313 U. S. 247, 85 L. Ed. 13.

MOTION TO STRIKE

Appellee's motion to strike clearly has no merit. Rule 20-2(f) of this court expressly authorizes quotations from opinions in appendix of brief. *Nothing* in that rule, however, provides that an appendix *must be limited* to opinion quotations, statutes, treaties, regulations, or rules. The rule expressly authorizes the same but not exclusively. It is always recognized that tabulations of evidentiary matters, such as our appendix I and N, is proper and convenient for the court and counsel. Realizing the grossly

excessive and indefensible amount of recovery, appellee has studiously refrained both in the findings and his brief from specifying definitely how he arrived at the amount of this judgment. The matters in appendix I and N should have been in the findings, but were intentionally omitted. Our appendix does not contain arguments, but merely a few brief explanations relative to the opinions quoted.

Appellee says (p. 38) that the court did not use this method in reaching the amount of his judgment. *That is why the judgment is erroneous and should be reversed.*

CONCLUSION

We therefore submit that the judgment is clearly erroneous and grossly excessive, and the same should be reversed with directions to enter judgment in the sum of $1800.00, less appellant's costs in both courts.

Respectfully submitted,

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, Jr.
Attorneys for Appellant